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AUTHOR Reutter, E. Edmund, Jr.
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ABSTRACT

This monograph reviews and analyzes relevant decisions dealing with the control of student activities by public school authorities. The report focuses on recent court cases that reaffirm, amplify, or extend entrenched constitutional and common law principles undergirding the public educational system in the United States. After setting the legal framework for control of student activities, the author discusses the law relevant to married students and mothers, rights of parents and students, rules of conduct, dress and appearance, expression of opinion, secret societies, and determination of punishments. (Author/JF)

Legal Aspects of Control of Student Activities by Public School Officials

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E. Edmund Reutter, Jr.

1970

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FOREWORD

This monograph by E. Edmund Reutter, Jr., is one of a series of state-of-the-knowledge papers* dealing with the general topic of student control and student rights in the public schools. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

Dr. Reutter focuses on "relatively recent cases that reaffirm, amplify, or extend firmly entrenched constitutional and common-law principles undergirding the public educational system in the United States." Skillfully and with superb judgment, Dr. Reutter reviews and analyzes the relevant written judicial decisions dealing with the control of student activities by public school authorities. After setting the legal framework for control of student activities, Dr. Reutter discusses the law relevant to rights of parents and students, rules of conduct, dress and appearance, secret societies, married students and mothers, expression of opinion, and determination of punishments.

Dr. Reutter is professor of education in the Division of Educational Institutions and Programs at Teachers College, Columbia University. He holds a bachelor's degree from Johns Hopkins University, and received his master's and doctor's degrees from Teachers College, Columbia University.

A nationally recognized scholar in the field of school law, Dr. Reutter is past-president of the National Organization on Legal Problems of Education, regional editor of the *NOLPE School Law Reporter*, and the author of numerous books and articles on school law. His most recent books are *The Law of Public Education* (1970), with R. R. Hamilton; *Schools and the Law* (revised 1970); and the 1970 edition of *The Yearbook of School Law*, with Lee O. Garber.

PHILIP K. PIELE, director
ERIC Clearinghouse
on Educational Management

JOHN PHILLIP LINN, president
National Organization on Legal
Problems of Education

*The other four papers are: (1) *Rights and Freedoms of Public School Students*, by Dale Gaddy, director, Microform Project, American Association of Junior Colleges, Washington, D.C.; (2) *Suspension and Expulsion of Public School Students*, by Robert E. Phay, associate professor of public law and government, University of North Carolina; (3) *Crime Investigation and Prevention in the Public Schools*, by William G. Buss, professor of law, University of Iowa; and (4) *Student Records*, by Henry E. Butler, Jr., professor of Educational Administration, University of Arizona.

ERIC and ERIC/CEM

The Educational Resources Information Center (ERIC) is a national information system operated by the United States Office of Education. ERIC serves the educational community by disseminating educational research results and other resource information that can be used in developing more effective educational programs.

The ERIC Clearinghouse on Educational Management, one of twenty such units in the system, was established at the University of Oregon in 1966. The Clearinghouse and its nineteen companion units process research reports and journal articles for announcement in ERIC's index and abstract bulletins.

Research reports are announced in *Research in Education (RIE),* available in many libraries and by subscription for $21 a year from the United States Government Printing Office, Washington, D.C. 20402. Most of the documents listed in RIE can be purchased through the ERIC Document Reproduction Service, operated by the National Cash Register Company.

Journal articles are announced in *Current Index to Journals in Education. CIJE* is also available in many libraries and can be ordered for $34 a year from CCM Information Corporation, 909 Third Avenue, New York, New York 10022. Annual and semiannual cumulations can be ordered separately.

Besides processing documents and journal articles, the Clearinghouse has another major function—information analysis and synthesis. The Clearinghouse prepares bibliographies, literature reviews, state-of-the-knowledge papers, and other interpretive research studies on topics in its educational area.

NOLPE

The National Organization on Legal Problems of Education (NOLPE) was organized in 1954 to provide an avenue for the study of school law problems. NOLPE does not take official positions on any policy questions, does not lobby either for or against any position on school law questions, nor does it attempt in other ways to influence the direction of legislative policy with respect to public education. Rather it is a forum through which individuals interested in school law can study the legal issues involved in the operation of schools.

The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, and executives and legal counsel for a wide variety of education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, and the NOLPE SCHOOL LAW JOURNAL.

LEGAL ASPECTS OF CONTROL OF STUDENT ACTIVITIES BY PUBLIC SCHOOL AUTHORITIES

By E. Edmund Reutter, Jr.*

INTRODUCTION

The purpose of this paper is to analyze and synthesize the law[1] relevant to control of student activities by public school authorities. The paper focuses on student activities associated with general conduct, as distinguished from curricular activities. By *law* is meant judicial decisions regarding the application of written statutes and rules, and judicial decisions in situations where no written regulations are involved. Value judgments, both educational and legal, will be avoided, except in the final section. This treatise is an analysis, not an advocacy.

The number of judicial decisions involving student conduct has burgeoned rapidly in recent years. The increased use of the judiciary to resolve conflicts between pupils (or parents) and school authorities has been a salient characteristic of the past decade. Old issues and questions have been reraised in modern trappings, and new queries have been put to the courts regarding the perennial conflict between rights and duties of students and rights and duties of school authorities.

Because each case arises in a context of facts, careful examination of the facts that form the setting of a specific judicial holding is essential. If the facts in a subsequent case are substantially different, the holding does not serve as precedent. Frequently, many issues are interwoven in a given case, requiring careful understanding of the basic legal question(s) answered by the court. For example, two cases substantively concerned with the regulation of secret societies of students may differ legally from each other far more than do a particular secret society case and a particular student marriage case. If a case is decided on a technical point, guidance for educators on substantive points may be completely lacking. Further, it must be emphasized that the long-range consequences of a decision derive from its central rationale, not from the drama of whether plaintiff or defendant prevailed or the presence of quotable and appealing phraseology.

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*Professor of Education, Teachers College, Columbia University. (Prepared as state-of-the knowledge paper for ERIC/CEA, May 1970).

[1]The analysis covers published decisions of federal courts through April 1970 and of state appellate courts through the April 1970 *General Digest*.

Generally, the paper focuses on relatively recent cases that reaffirm, amplify, or extend firmly entrenched constitutional and common-law principles undergirding the public educational system in the United States. Some general principles and understandings, however, will be briefly recalled as a setting for the major portion of the treatise.

LEGAL FRAMEWORK FOR CONTROL OF STUDENT ACTIVITIES

Bases of Control

School boards in all states have express or implied power to adopt rules and regulations relating to student conduct. Typically, statutes grant to boards of education broad powers and also some specific powers related to student control. Among the more concrete statutes, some restate the common-law authority of school personnel, some expand or contract the common law, some set up procedures to be used in meting out punishments, and some prohibit specific punishments. Expulsion is the punishment that receives the most frequent specific attention in statutes.

It is well settled that the state has the power to require its young to submit to instruction in those subjects "plainly essential to good citizenship."[2] Of necessity, therefore, those in charge of the schools (state boards of education, chief state school officers, local boards of education, and professional staffs of local school systems) must be empowered to establish reasonable rules and regulations. Although local rules and regulations may not supersede statutes or regulations of state-level educational authorities, they may implement and supplement them. Of course, neither state nor federal constitutional rights of students may be abridged by any rule.

Because it is impossible to promulgate rules and regulations to cover all situations, rules need not be in writing to be enforceable. Also, out of concern for practicality and reality, the courts recognize that school administrators and teachers must possess implied powers to control pupil conduct on matters and with methods not in conflict with local board policy or higher authority. Often in cases of pupil discipline the rule and the punishment for violating it are inextricably interwoven. Also, particularly in some recent cases, the issue of procedural due process has overshadowed both the rule and the penalty.

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[2]Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925).

Scope of Control

The control school authorities may exercise over the activities of students is circumscribed by the nature of the relationship between public schools and pupils. Rules and regulations must have as their objective the proper functioning of the school. They must reasonably relate to the purposes for which schools are established. Thus, conduct that can reasonably be deemed contrary to the educational mission of the school can be proscribed.

The courts recognize the need for a proper atmosphere so that learning can take place. Thus, activities disruptive of the general decorum of the school are punishable. Disruption of the climate of learning affects the rights of other children to receive an education. Interference with the rights of others may be specific, such as physically barring access to facilities; or it may be general, such as acting to undermine the authority of school personnel over pupils.

Even conduct off school premises can be controlled by school authorities if it can be shown to be deleterious to the efficient operation of the school. The crucial issue is the effect of the conduct on the operation of the school, rather than the time or place of the offense. However, of course, it is much more difficult for school authorities to justify the reasonableness of control exercised over out-of-school activities of pupils.

The "In Loco Parentis" Doctrine

The common-law measure of the rights and duties of school authorities relative to pupils attending school is the *in loco parentis* concept. This doctrine holds that school authorities stand in the place of the parent while the child is at school. Thus, school personnel may establish rules for the educational welfare of the child and may inflict punishments for disobedience. The legal test is whether a reasonably knowledgeable and careful parent might so act. The doctrine is used not only to support rights of school authorities (the focus of this paper), but to establish their responsibilities concerning such matters as injuries that may befall students.

The Presumption of Validity

The law presumes that those having authority will exercise it properly. Generally, therefore, in claims of improper application of authority, the burden of proof is on the person making the

claim. For example, a parent who objects to a rule or to a punishment generally has the burden of establishing unreasonableness.

However, the board must have some basis for its actions other than the assertion that it is acting in the best interests of the pupil or school. Further, the more closely a rule comes to infringing upon a basic constitutional right of a pupil, the more justification school authorities must have for the rule. As more and more rules are being challenged on constitutional grounds, particularly First Amendment grounds, courts are looking much more closely at the rationales offered by school authorities to support challenged rules.

The Test of Reasonableness

The ultimate determination of reasonableness is a function of the courts. *Reasonable* means that the action could be accepted by men of normal intelligence and experience as rationally appropriate to the end in view. To declare invalid a rule controlling student activities in public schools, it must be shown to be unreasonable. Obviously, it is not reasonable to fail to comply with the federal or state constitution or statutes properly enacted thereunder. However, many, if not most, rules are not disposed of under the rubrics of unconstitutionality or contrariness to statute. Rules frequently involve implied powers of school authorities, rather than express powers.

For the test of reasonableness, a rule of pupil conduct must be assessed in terms of the educational goal to be achieved and the likelihood the rule will help achieve that goal. That reasonableness does not exist in the abstract will be illustrated in this paper. A rule may be declared unreasonable per se, or in its particular application. This distinction is important legally.

The Role of the Courts

Of crucial importance in understanding the relation of the courts to control of student activities by public school authorities is the paramount principle that the courts will not interfere with an act of the legislative or the administrative branch unless the branch has exceeded its powers or has abused its discretion in wielding its powers. It must be emphasized that the question before a court is not whether the court approves the rule as one it would have made, had it been in control of the administrative or legislative branch. Nor is the question whether the rule is essential to the proper operation of the school. As noted previously, the

burden of proof of improper action by school authorities is generally on the complainant.

Courts theoretically may not pass on the wisdom of legislative or administrative acts. Thus, disagreement with the desirability or efficacy of a regulation cannot form the basis of a complaint to be handled by the judiciary. The subject matter of a school regulation may be attacked in court if it is alleged that the domain of the rule is not a proper one for intrusion by school authorities, that the regulation violates a prescription of the federal or state constitution or a statute, or that the rule is unreasonable in the sense discussed in the preceding section.

Through the years courts have rendered judgments in specific situations and have recorded their reasoning when they have sustained or annulled given rules. From an analysis of these opinions, guidance can be obtained as to considerations courts will be likely to weigh in deciding future cases. The major portion of this paper is devoted to such analysis.

RIGHTS OF PARENTS AND STUDENTS, IN GENERAL

Operation of the public schools without rules and regulations would be impossible. Those regulations that pertain to conduct obviously restrict the rights of students and parents. Indeed, the whole concept of compulsory education is an exception to the right of the parent to direct completely the upbringing of his children.

The United States Supreme Court in 1925 discussed the rights of parents in a case where it held that the compulsory-education requirement need not be met in a public school, but could be met in a private school.[3] In this case a private sectarian school and a private nonsectarian school had contended they were being deprived of their constitutional right to engage in a useful business by an Oregon statute that required children of certain ages to attend public schools only. Although the Court decided the case on the basis of Fourteenth Amendment property rights of the schools, it discussed parents' rights as follows: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court further stated that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable

[3]Pierce v. Society of Sisters, *supra*, note 2.

relation to some purpose within the competency of the State." It commented that the challenged statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

In 1969, in its first opinion directly on regulation of student conduct per se, the Supreme Court said, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students. It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[4]

Although technically the rights of pupils and the rights of parents may be separable, in this paper these rights are treated together as on one side of the balance, with the rights of school authorities on the other side. (Because most public school students are minors, suits involving school regulations generally are brought by parents or guardians either on their own behalf or on behalf of the students affected.) How the balance is struck by the courts in specific situations will be discussed in subsequent sections.

RULES OF CONDUCT, IN GENERAL

In the 1969 case referred to in the preceding section, the United States Supreme Court stated it "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[5]

In a 1968 case in which the Court invalidated a statute that barred teaching the theory of evolution in public institutions, the Court stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional values. On the other hand, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools. . . . "[6]

[4]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969).
[5]Tinker v. Des Moines Independent Community School District, *supra*, note 4.
[6]Epperson v. State of Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968).

Over a half-century before, in upholding the right of Mississippi to prohibit secret fraternities and sororities in the educational institutions of the state, the Court said, "It is not for us to entertain conjectures in opposition to the views of the State, and annul its regulations upon disputable considerations of their wisdom or necessity."[7]

The general power of school boards to enact rules and regulations governing the conduct of students during the school day is well established. From a legal viewpoint, one of the most troublesome periods of the school day has been the lunch period. Several cases dealing with school regulations on the lunch period have been decided by the courts. The leading case was decided in 1926 by the Supreme Court of Appeals of Virginia.[8] At issue was the validity of a rule that prohibited children from leaving school premises during the school day. Parents of two children asked to have them relieved of this restriction so they could eat a midday meal at home or with their father in a downtown hotel. The exception to the rule was denied, but the children continued to eat lunch with their father at the hotel. The students were suspended from school, and the parents filed suit.

The court found the rule reasonable. It stated, "while it may be argued with force that a warm meal at midday is preferable to a cold lunch, it is not conclusive that the latter is destructive of health. It is a matter of common knowledge that in the towns and rural sections the vast majority of school children partake of a cold lunch at midday." However, the court admonished school authorities that "while a rule may be legally reasonable, it should not be without elasticity. In the enforcement of every law there should be brought into play the element of common sense."

The advent of school cafeterias led some school boards to require that students who did not go home for lunch remain in school and either buy food in the cafeteria or eat there food brought from home. In effect, the patronizing of neighborhood eating establishments was barred. The power of school boards to establish such rules has been uniformly upheld. As justification for these rules, courts emphasize the health of the children and the disruption that would be caused by students coming and going from eating places off the premises. The fact some private businesses may be denied sales to pupils during the school day does

[7]Waugh v. Board of Trustees of the University of Mississippi, 237 U.S. 589, 35 S.Ct. 720 (1915).
[8]Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926).

not render the rules invalid. The most recent appellate court so to hold was the Court of Appeals of Kentucky in 1955.[9] Citing the *Flory* case *(supra)*, the Court said:

> It is common knowledge that children, if allowed to depend upon their own selection, often indulge themselves in unbalanced diets. Furthermore, if uncontrolled at table young children are apt to enagage in rough or uncouth practices and conduct. If the school lunch is to be successful, then all children who purchase their noon meal may be required to do so from the school lunchroom. The regulation appears to be for the common good of all children attending this school and we find that it is not unreasonable or arbitrary.

A related rule was upheld by the Court of Civil Appeals of Texas in 1960.[10] The regulation provided that students driving automobiles to school must park them in the parking lot when they arrive at school in the morning and not move them until 3:45 p.m. unless by special permission. The case arose when a girl (with the encouragement of her father) insisted on parking her car at a private house one block from the school, going home to lunch in it each day, and reparking it at the same place until school was over for the day.

Before sustaining the power of the board to enforce the rule against the girl, the court received uncontroverted testimony that, prior to the rule, fifty or sixty automobiles driven to school by students would be driven away at the noon hour. The high school, the parking area, a grade school, and playgrounds were all located in the immediate vicinity, and small children would be passing at the time the cars were leaving. The court found the regulation valid because it was "for the purpose of controlling the conduct of the students to the end that student pedestrians on the streets adjacent to the schools might be safe from student operated automobiles and that better order, decorum and discipline might prevail at the noon recess."

Perhaps the oldest appellate case dealing with control of school activities off school premises is one decided in 1859 in Vermont. A high school pupil, in the presence of other pupils, but after school hours and after he had returned home, called the teacher "old Jack Seaver."[11] The next morning Mr. Seaver whipped the boy. The boy's father brought suit. The Supreme Court of Vermont held the punishment justified because the misbehavior had a "direct and immediate tendency to injure the school, to subvert the

[9]Casey County Board of Education v. Luster, 282 S.W.2d 333 (Ky. 1955).
[10]McLean Independent School District v. Andrews, 333 S.W.2d 886 (Tex.Civ.App. 1960).
[11]Lander v. Seaver, 32 Vt. 114, 76 Am.Dec. 156 (1859).

master's authority, and to beget disorder and insubordination." The court distinguished between punishable and unpunishable off-school-premises conduct as follows:

> [Punishable conduct] is not misbehavior generally, or toward other persons, or even toward the master in matters in no ways connected with the school. For, as to such misconduct committed by the child after his return home from school, we think the parents, and they alone, have the power of punishment. But where the offense has a direct and immediate tendency to injure the school and bring the master's authority into contempt . . . we think he has the right to punish the scholar if he comes again to school . . .

One of the most-quoted cases dealing with punishment of pupils for acts committed off school premises was decided by the Supreme Court of Errors of Connecticut in 1925.[12] The principal had received a complaint from the mother of two small girl pupils that they had been frequently abused by three boys while on their way home from school. The principal later received a note from the mother saying she had witnessed the same boys annoying two other small girls who were on their way home from school. The locality was the premises of the mother of one of the boys.

The principal summoned the boys to the office and told them of the offenses charged against them. When the boys admitted their guilt, the principal administered corporal punishment in a moderate manner. Suit for damages was brought by the boy who lived where the incident occurred. The question before the appellate court was whether a rule could be adopted "which attempts to control the conduct of pupils outside of school hours after they have reached their homes." In finding that the principal had the power to act as she did, the court said:

> Examination of the authorities clearly reveals the true test of the teacher's right and jurisdiction to punish for offenses not committed on the school property or going and returning therefrom, but after the return of the pupil to the parental abode, to be not the time or place of the offense, but its effect upon the *morale* and efficiency of the school, whether it in fact is detrimental to its good order, and to the welfare and advancement of pupils therein. If the conduct punished is detrimental to the best interests of the school, it is punishable, and in the instant case, under the rules of the school board, by corporal infliction.

In answer to the argument that the proper resort of the principal in correcting the abuse was to the parents or to the public prosecutor, the court stated:

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[12] O'Rourke v. Walker, 102 Conn. 130, 128 A. 25 (1925).

> Some parents would dismiss the matter by saying that they give no attention to children's quarrels; many would champion their children as being all right in their conduct. The public authorities would very properly say, unless the offense resulted in quite serious injury, that such affrays were too trifling to deserve their attention. Yet the harm to the school has been done, and its proper conduct and operations seriously harmed, by such acts.

The court pointed out that, although the plaintiff had reached his home after school, his victims had not.

Two old cases illuminate the degree of control school authorities have over activities related to off-campus study of pupils. In one case the court held that a teacher was justified in punishing a pupil for refusing to do homework.[13] The rule was enforceable even though the pupil had home obligations after school hours.

In contrast, a rule requiring pupils to remain at home and study between the hours of seven and nine in the evening was declared invalid.[14] In this case the court stated:

> Certainly a rule which invades the home, and wrests from the parent his right to control his child around his hearthstone, is inconsistent with any law that has yet governed the parent in this state . . . In the home the parental authority is and should be supreme. . . .
>
> It may be that the school authorities would have a right to make certain regulations and rules for the good government of the school which would extend and control the child even when it has reached its home; but if that power exists, it can only be done in matters which would per se have a direct and pernicious effect on the moral tone of the school, or have a tendency to subvert and destroy the proper administration of school affairs.

DRESS AND APPEARANCE

Legal problems related to dress and appearance of students have mushroomed in recent years, with students and parents challenging attempts by school officials to prescribe or prohibit certain modes of dress or appearance. The overwhelming majority of cases have dealt with attempts to prohibit styles of dress or appearance, especially hairstyles and beards.

Prescribed Dress and Appearance

Rarely has the prescribing of specific dress been involved in appellate courts. However, one case met squarely the issue of the enforceability of a school board regulation that required boys at-

[13]Bolding v. State, 23 Tex.App. 172, 4 S.W. 579 (1887).
[14]Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909).

tending a county agricultural high school to wear khaki uniforms on campus and in public places within five miles of the school.[15] Some students boarded at the school; others were day pupils.

The Supreme Court of Mississippi upheld the rule as applicable to the students who were boarding at the school because they were under the care and custody of the authorities for the term. However, the rule could be applied to day pupils only when they were actually in school or going to or from school. The board had argued that, because of local conditions, the regulation was necessary for the maintenance of discipline. This appears to be the only appellate case decided on substantive grounds on the point of prescribed dress for school attendance.

A recent case involved a California school board's order that required female students at one high school to wear, four days a week, prescribed clothing as follows: "middy blouse with collar and tie, and a blue, black, or white skirt." A girl ignored this rule and appeared at school "neatly and modestly dressed in a non-uniform blouse and skirt." She stated she would not wear the uniform because the regulation was "unreasonable and a violation of her constitutional rights." She did not claim religious or cost grounds. School officials suspended her. Suit was brought to prohibit the enforcement of the requirement and to reinstate the girl. The trial court ruled against the board, but on appeal that decision was reversed on procedural grounds.[16] However, the appellate court noted that no evidence had been presented by the board as to conditions that might support the rule.

Prescription of elements of dress on specific occasions in the school must meet the test of reasonableness, with the burden of proof on the complainant. For example, a school board in Iowa required the wearing of a gown at graduation. Three girls who refused to wear the gown were prohibited by the board from participating in the ceremony and receiving their diplomas. The Supreme Court of Iowa ruled that the wearing of the cap and gown had no relation to educational values and that the diplomas, which had been withheld, must be awarded.[17] However, the court emphasized, "We are not questioning the wearing of caps and gowns. It is a custom we approve. The board may deny the right of a graduate to participate in the public ceremony of graduation unless a cap and gown is worn."

[15]Jones v. Day, 127 Miss. 136, 89 So. 906 (1921).
[16]Noonan v. Green, 276 A.C.A. 44, 80 Cal.Rptr. 513 (1969).
[17]Valentine v. Independent School District of Casey, 191 Iowa 1100, 183 N.W. 434 (1921).

The wearing of certain types of clothing in such classes as shop and physical education would seem necessary for the safety of pupils. The Supreme Court of Alabama dealt at length with the matter of prescribed clothing in physical education in a case where a girl was suspended from high school because she refused to participate in the required physical education class.[18] Her refusal was directed against the uniform to be worn for the exercises, which she contended was "immodest and sinful." She was supported by her father, who did not wish her even to be in the presence of the teacher and other pupils wearing the outfit.

The school officials stated they would permit the girl to dress in a manner she considered suitable and would allow her not to partake in any exercise that required clothing she or her parents thought immodest. However, her father did not want her to attend the class at all.

The court ruled that the girl must participate in the physical education class under the modified circumstances allowed by the school officials. The court believed appropriate concessions had been made by the school authorities. It rejected the parent's claim that, out of respect for the girl's religious beliefs, she should be placed in a special class for students who shared her beliefs so she would not stand out as a "speckled bird" in the regular class.

Some school "dress codes" are worded positively (prescriptions) and some negatively (proscriptions). Regardless of the grammar of these codes, cases that have reached the level of court cited in this paper have revolved about the key question whether a student may be punished, usually by exclusion, if his appearance does not conform to the code. These cases are treated in sections immediately following.

Prohibited Dress and Appearance

For well over three decades before 1965 no case reached a federal or an appellate state court in which the decided issue was the right of a school board to restrict the dress of a student as a condition for attending school. Beginning in 1965, however, a continuing rash of cases on this point has appeared. Indeed, there are very few areas in school law in which so many cases dealing with the same subject have been handled by so many courts in so short a period of time.

[18]Mitchell v. McCall, 273 Ala. 604, 143 So.2d 629 (1962).

The "old" cases, which generally supported the boards, set up rules and guidelines that apparently were acceptable as applied until very recently. A new sensitivity to individual rights—and particularly the rights of young people—has emerged in our society. This sensitivity has been reflected in the courts, where actions of school boards that may infringe on the constitutional rights of pupils have come under increasing surveillance. Thus, not only are more students (and parents and civil libertarians in general) questioning the authority of boards in matters of dress, but the reasons school officials have for establishing the regulations are being more carefully examined by the courts.

Rather than leaving the burden of showing unreasonableness completely on the student, the courts are requiring more evidence of the board's basis for such rules. Although the proposition that the proclivities of individual judges affect the outcome of such cases is not completely without support, analysis of the facts of the cases reveals a significant degree of consistency among the courts—both those courts that have upheld students in individual cases and those that have upheld school authorities. Crucial differences among cases lie in the formulation and application of the rules.

A frequently cited case is a 1923 decision of the Supreme Court of Arkansas.[19] At issue was this board rule: "The wearing of transparent hosiery, low-necked dresses, or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited." A girl who failed to obey the rule was denied admission.

In upholding the board's power to establish the rule, the court said it "must uphold the rule unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is, of promoting discipline in the school." The court commented that whether it would have made the rule were it in control of the district was not the question. Nor did the court find it necessary to determine that the rule was "essential to the maintenance of discipline."

The court further indicated it had "more important functions to perform than that of hearing the complaints of disaffected pupils of the public schools against rules and regulations promulgated by the school boards for the government of the schools." Neverthe-

[19]Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

less, the court recognized that "the reasonableness of such rule is a judicial question." It also noted, however, that "the directors are elected by the patrons of the schools over which they preside . . . [and] are in close and intimate touch with the affairs of their respective districts, and know the conditions with which they have to deal." The court added:

> In the discharge of the duty here imposed upon us it is proper for us to consider whether the rule involves any element of oppression or humiliation to the pupil, and what consumption of time or expenditure of money is required to comply with it. It does not appear unreasonable in any of these respects. Upon the contrary, we have a rule which imposes no affirmative duty, and no showing was made, or attempted, that the talcum powder possessed any medicinal properties, or was used otherwise than as a cosmetic.

This case was cited by the United States Supreme Court in 1969 in the *Tinker* armband case *(infra)*. The Court noted that *Tinker* was not a case involving this type of school board regulation.

In 1931 the Supreme Court of North Dakota held that a board of education had the power to forbid pupils from wearing metal heel plates in school.[20] The justification for the rule was that the floors were being damaged and a disturbance created by the noise of the heel plates. The parents' claim of the right to determine the clothing to be worn to school by their children was held to have to give way to the public interest in "the conservation of school property and the maintenance of good order and discipline in the school."

In 1934 the Supreme Judicial Court of Massachusetts sustained a school board's enforcement of a rule that, although aimed primarily at membership in secret societies, barred the wearing of insignia and apparel of such societies on school premises.[21]

The only published decision specifically on the wearing of slacks by girls was one decided by a New York trial court in 1969.[22] Contested was a regulation prohibiting slacks except when "permitted by the principal between December 1 and March 31 on petition by the student council when warranted by cold or inclement weather." A girl pupil who had been punished by detention for wearing slacks sought an injunction against enforcing the entire dress code, including the section on slacks. Although the court refused to annul the whole dress code, it ruled that the board had no power to enforce the specific rule. It reasoned:

[20]Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).
[21]Antell v. Stokes, 287 Mass. 103, 191 N.E. 407 (1934).
[22]Scott v. Board of Education, 305 N.Y.S.2d 601 (1969).

> The simple facts that [the rule] applies only to female students and makes no differentiation as to the kind of slacks . . . make evident that what is being enforced is style or taste and not safety, order, or discipline. A regulation against the wearing of bell-bottomed slacks by students, male or female, who ride bicycles to school can probably be justified in the interest of safety, as can, in the interest of discipline, a regulation against slacks that are so skintight and, therefore, revealing as to provoke or distract students of the opposite sex, and, in the interest of order, a regulation against slacks to the bottoms of which small bells have been attached.

Hairstyles and Beards

The first appellate court decision on the question of control of student hairstyle was in Massachusetts in 1965.[23] A school principal told a student he must have his hair cut if he wished to attend school. The principal wrote a letter to the student's parents indicating their son had been suspended for violation of "school dress regulations [that] do not allow 'extreme haircuts or any other items which are felt to be detrimental to classroom decorum.'" The court, citing with approval the *Antell* case *(supra)* and the *Pugsley* case *(supra)*, said it needed "only to perceive some rational basis for the rule requiring acceptable haircuts in order to sustain its validity. Conversely, only if convinced that the regulation of pupils' hair styles and lengths could have no reasonable connection with the successful operation of a public school could we hold otherwise."

> We are of opinion that the unusual hair style of the plaintiff could disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress. Thus as with any unusual, immodest or exaggerated mode of dress, conspicuous departures from accepted customs in the matter of haircuts could result in the distraction of other pupils.
>
> We are mindful that the regulation of haircuts may affect the private and personal lives of students more substantially than do restrictions regarding dress. Whereas the latter need not operate beyond the school premises, the former will inevitably do so. Therefore the plaintiff contends that the challenged ruling is an invasion of family privacy touching matters occurring while he is at home and within the exclusive control of his parents . . .
>
> . . . [But] here, the domain of family privacy must give way in so far as a regulation reasonably calculated to maintain school discipline may affect it. The rights of other students, and the interest of teachers, administrators and the community at large in a well run and efficient school system are paramount.

The student's attorney presented evidence that the student had been a "professional musician" and had performed at the New-

[23]Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

port Jazz Festival, the New York World's Fair, and other places. The contention was made that, even if the rule per se were valid, the application to this particular student was unreasonable. The court disagreed:

> But the discretionary powers of the committee are broad, and the courts will not reverse its decision unless it can be shown it acted arbitrarily or capriciously. [Citations] The committee could have concluded that, regardless of the detriment to the plaintiff's professional life, only the strictest application of the regulation could ensure its success. We cannot say that its decision was an abuse of power.

The next officially reported case dealing with hairstyle was decided in favor of school authorities by a federal district court in Texas.[24] A group of high school students had formed a musical group, signed a contract with an agent, and insisted that they were under contract with the agent to maintain their dress and personal appearance, including a so-called "Beatle" type hairstyle.

On the opening day of school the students, accompanied by the mother of one and by the booking agent, went to the office of the principal to confer, since the students understood they would be denied admission to the school because of their hairstyle. After admission was denied, they went to the superintendent's office, where they were told that the principal of each school sets the rules and regulations regarding student dress for his school. The boys' parents then filed suit to have the boys admitted to school.

In court the principal testified the boys' long hair caused trouble and commotion, led to obscene remarks, attracted attention, and disrupted the classroom. He stated that, though he had not ruled out long hair completely, he did not accept the extreme "Beatle" style. He further testified that the agent of the boys had called him at home, inquired whether the boys would be admitted, and indicated he had $4,000 invested in them and was willing to invest another $1,000.

Additional testimony revealed that immediately after being refused admittance the boys had gone to a local recording studio and recorded a song that contained lyrics referring to the incident of being refused admission by the principal. Copies of the record were produced and distributed by the agent to various radio stations in the area, and the record was played on the air.

The Court of Appeals for the Fifth Circuit affirmed this decision for the school board by a two-to-one vote in 1968, and the

[24]Ferrell v. Dallas Independent School District, 261 F.Supp. 545 (D.C.Tex. 1966).

United States Supreme Court denied certiorari later that year.[25] Subsequently, the Supreme Court referred to this case in *Tinker (infra)* and differentiated it. The opinion of the Court of Appeals included the following:

> In view of the testimony of [the principal] as to the various problems which arise in the school due to the wearing of long hair by members of the student body and the testimony of certain students that their hair style had indeed created some problems during school hours, we cannot say that the requirement that appellants trim their hair as a prerequisite to enrollment is arbitrary, unreasonable or an abuse of discretion. Therefore, the school regulation as promulgated by the principal, banning long hair, is not violative of the state constitution or statutes . . . .
>
> The [United States] Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.
>
> The compelling reason for the state infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.

In 1969, another Court of Appeals, that of the Seventh Circuit, affirmed a district court decision in favor of a pupil in a hairstyle case from Wisconsin.[26] The vote was two to one. At issue was the following regulation:

> Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out.

The plaintiffs were two male high school students with long hair who were barred from attending school until their appearance conformed to the rule.

In the trial before the district court, the school board contended that the regulation was valid and that to allow students not to respect board regulations would be improper for a court. The board argued that failure to obey a regulation is a cause of disruption and that judicial interference with the board's authority would only intensify such disruption. Furthermore, it asserted that learning to respect authority is a part of students' education. The trial court replied, "if the regulation is fairly found to violate the

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[25]Ferrell v. Dallas Independent School District, 392 F.2d 697 (5 Cir. 1968), cert. denied, 393 U.S. 856, 89 S.Ct. 98 (1968).

[26]Breen v. Kahl, 296 F.Supp. 702 (D.C.Wis. 1969), affirmed, 419 F.2d 1034 (1969).

Constitution, responsibility for these consequences rests with the agency which promulgated the regulation."

The court gave great weight to the lack of evidence in support of the school board's assertions:

> With respect to the "distraction" factor, the showing in this record consists of expressions of opinion by several educational administrators that an abnormal appearance of one student distracts others. There is no direct testimony that such distraction has occurred. There has been no offer of the results of any empirical studies on the subject by educators, psychologists, psychiatrists, or other experts. . . . From the testimony of the educational administrators, it appears that the absence of such amplification is not accidental; it arises from the absence of factual data which might provide the amplification.
>
> With respect to the "comparative performance" factor, this record is equally barren. . . . No hard facts are adduced even from a limited sample to demonstrate that the academic performance of male students with long hair is inferior to that of male students with short hair, or that the former are less active or less effective in extra-curricular activities.

The court concluded that the school officials had "fallen far short" of bearing the "substantial burden of justification" required for a rule or statute "which rudely invades . . . a highly protected freedom." It ordered the students reinstated, with any notation of disciplinary action to be expunged from their records.

The decision of the Court of Appeals stated, "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." Without precisely clarifying the derivation of the right, the court said that "it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment." This being so, "to limit or curtail this . . . right, the state has a 'substantial burden of justification.'"

The appellate court commented that although state action that differently treats adults and high school students may be justified, minors are protected in school from "arbitrary and unjustified governmental rules." The court emphasized the absence of evidence to support the contentions "that (1) a Williams Bay male high school student whose hair is longer than the Board's standard so departs from the norm that his appearance distracts his fellow students from their school work, and (2) students whose appearance conforms to community standards perform better in school."

> While we do not decide whether a valid showing of any single or combination of justifications, which the School Board did or did not raise, would be sufficient to satisfy the state's substantial burden, in the absence

of a valid showing of any of these justifications, such burden is clearly not met.

The failure of appellants [school authorities] to sustain any burden of substantial justification distinguishes the case at bar from the situation in [*Ferrell* (*supra*)] upon which the appellant School Board heavily relies. In *Ferrell*, the court in upholding the constitutionality of the school regulation found that wearing of long hair by students created disturbances and problems during school hours . . . . [I]n the case at bar there is no evidence of any disturbance created by the long hair of the students.

Regarding the possibility of its decision having a potential adverse effect on discipline, the court observed:

To uphold arbitrary school rules which "sharply implicate basic constitutional values" for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution.

In addition to the cases already discussed, twelve other United States district court decisions regarding hairstyles and beards in public elementary and secondary schools have been officially published.[27] Eleven of these were decided in the ten-month span ending in February 1970. The courts ruled for the boards in six of the cases and for the students in six. Students also prevailed in two junior college cases.[28] Some of the cases are being appealed. Without describing each case in detail, some observations will be made.

The courts have differed on the precise analytical and theoretical framework for viewing one's right to choose his hairstyle, as well as on the extent of the right. Whether that right resides in the "penumbra" of the First Amendment, whether it is clearly within the First Amendment as symbolic speech, or whether it is a general right covered by the Ninth Amendment, most of the courts have agreed that some type of constitutional right is involved. Therefore, Fourteenth Amendment guarantees apply. Both the equal protection and the due process clauses have been invoked as part of jurisprudential approaches to hairstyle cases.

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[27]Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F.Supp. 1316 (D.C.Colo. 1969); Crews v. Cloncs, 303 F.Supp. 1370 (D.C.Ind. 1969); Crossen v. Fatsi, 309 F.Supp. 114 (D.C.Conn. 1970); Davis v. Firment, 269 F.Supp. 524 (D.C.La. 1967); Griffin v. Tatum, 300 F.Supp. 60 (D.C.Ala. 1969); Olff v. East Side Union High School District, 305 F.Supp. 557 (D.C.Cal. 1969); Pritchard v. Spring Branch Independent School District, 308 F.Supp. 570 (D.C.Tex. 1970); Richards v. Thurston, 304 F.Supp. 449 (D.C.Mass. 1969); Sims v. Colfax Community School District, 307 F.Supp. 485 (D.C. Ia. 1970); Stevenson v. Wheeler County Board of Education, 306 F.Supp. 97 (D.C.Ga. 1969); Westley v. Rossi, 305 F.Supp. 706 (D.C.Minn. 1969); Wood v. Alamo Heights Independent School District, 308 F.Supp. 551 (D.C.Tex. 1970).

[28]Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (D.C.Tex. 1969); Zachry v. Brown, 299 F.Supp. 1360 (D.C.Ala. 1967).

However, since all abstract rights can be restricted to some extent under certain circumstances, the cases have revolved about whether such circumstances are present in a given situation.

On occasion the Civil Rights Act of 1871 has been cited. This statute imposes liability to injured parties on anyone who "under color" of law causes any citizen of the United States to be deprived of any constitutional guarantees. In no case to date involving pupils has such liability been found. The first court to deal with this contention held that the Civil Rights Act was not applicable.[29] The court took the position that although symbolic expression is constitutionally protected, "a symbol must symbolize a specific idea or viewpoint," and a hairstyle does not signify anything particular. The court contrasted hairstyle to such protected symbols as saluting the flag and wearing "freedom buttons."

Although another court did assume hairstyle represented symbolic speech, it still refused to invalidate a school rule regarding length of hair.[30] Still another federal district court, though it nullified a hairstyle rule, did not "find it necessary to reach or decide" the contention that hairstyle is a form of expression protected under the First Amendment.[31] This court stated that freedom of personal appearance is "highly important in preserving the vitality of our traditional concepts of personality and individuality."

The court recognized "the basic principle that school authorities are possessed with the power and duty to establish and enforce regulations to deal with activities which may materially and substantially interfere with the requirements of appropriate discipline in the school." The court responded to the rationale of the school board as follows:

> The school authorities' "justification," or the reasons they advance for the necessity for such a haircut rule, completely fail. If combing hair or passing combs in classes is distracting, the teachers, in the exercise of their authority, may stop this without requiring that the head be shorn. If there is congestion at the girls' mirrors, or if the boys are late for classes because they linger in the restrooms grooming their hair, appropriate disciplinary measures may be taken to stop this without requiring a particular hair style. If there is any hygienic or other sanitary problem in connection with those students who elect to wear their hair longer than that presently permitted by the regulation there are ways to remedy this other than by requiring their hair shorn. The same is true of their failure to participate in the physical educational programs. As to the fear that

[29]Davis v. Firment, 269 F.Supp. 524 (D.C.La. 1967), affirmed, per curiam, 408 F.2d 1085 (5 Cir. 1969).
[30]Crews v. Cloncs, 303 F.Supp. 1370 (D.C.Ind. 1969).
[31]Griffin v. Tatum, 300 F.Supp. 60 (D.C.Ala. 1969).

> some students might take action against the students who wear hair longer than the regulation now permits, suffice it to say that the exercise of a constitutional right cannot be curtailed because of an undifferentiated fear that the exercise of that right will produce a violent reaction on the part of those who would deprive one of the exercise of that constitutional right.

The court noted that the student's academic standing was above average, that with the possible exception of his hairstyle he was neat and well groomed, that he had caused no other disciplinary problems in the school, and that he was "in all respects an above-the-average student."

In cases decided since February 1969, the courts have been consistently referred by counsel for the plaintiff to the *Tinker* armband decision of the Supreme Court *(infra)*. Courts that rule for the school board emphasize that the Supreme Court's reasoning in *Tinker* was based on a finding of "direct, primary First Amendment rights akin to 'pure speech'" and that the Supreme Court expressly stated, "The problem presented . . . does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment." They also point out that the Court in that case offered as a comparison the Fifth Circuit case of *Ferrell (supra)* in which the board was upheld and which the Supreme Court had declined to review. Courts ruling for the pupils read broader implications into the *Tinker* opinion and emphasize as crucial to enforcement the need to show substantial interference with operations of the school. Regardless of the position the courts take, they invariably consider the opinions of other courts that support their views to be "better reasoned."

Participation by students, parents, and teachers in the development of codes of dress or appearance has been cited in some cases. For example, some importance appears to have been attached to such participation in a decision supporting a board rule in Denver.[32] The court noted the dress code was periodically reviewed and at that time was under review by a committee of two parents, two students, two teachers, and two administrators. Further, it observed that a survey of students had shown support for the restriction on hair length. It must be emphasized, of course, that majority approval per se cannot deprive an individual of a constitutional right.

In the only case to date involving the hair of a female pupil, a federal district court in Iowa found that "regardless of the applicability of the First Amendment a student's free choice of his ap-

[32]Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F.Supp. 1316 (D.C.Colo. 1969).

pearance is constitutionally protected under the due process clause of the Fourteenth Amendment . . . . Moreover, the Court finds that because every individual should have the right to express his individuality and personality, any rule seeking to infringe such a right will not enjoy a 'presumption of constitutionality.' "[33]

In this case the board offered two main reasons in support of the hair rule. One was that the rule "promoted good citizenship by teaching respect for authority and instilling discipline." The court observed that such an argument would lead to justification of any rule promulgated by school authorities. The other reason was that the typing instructor was unable to see the student's eyes during class. On this point, the court said, "While the Court [did] not doubt the pedagogical importance of eye observation in typing, the Court, as trier of fact, was totally unconvinced that such a problem actually existed in this case."

Two relevant cases have come before appellate state courts of California. One was decided in favor of the board and the other in favor of the student plaintiff.

The board was supported in a case where a student was denied enrollment in a high school so long as he wore a beard. The court stated that "the decisive issue confronting us is simply whether the respondent-School Board's Good Grooming Policy constitutes an unreasonable infringement of petitioner's constitutional rights." The court applied the test for such situations established by the Supreme Court of California. According to this test, a governmental agency seeking to impose restrictions on the exercise of an individual's constitutional right must demonstrate that the restraint "rationally relates to the enhancement of the public service," that "the benefits that the public gains by the restraint outweigh the resulting impairment of the constitutional right," and that "no alternatives less subversive of the constitutional right are available."

On the first point, the court noted that the evidence presented at the trial showed the policy to be the result of the considered judgment of a number of persons experienced in education. Experts testified the wearing of a beard would definitely disrupt the educational process and as such would prejudice the environment and other students.

On the second point, the court noted that the wearing of beards by male high school students had constituted a disruptive influ-

[33]Sims v. Colfax Community School District, 307 F.Supp. 485 (D.C.Ia. 1970).

ence on the educational process. The court reasoned, "Good study habits and proper conduct on the part of youngsters constitute attributes which are beneficial to the general public and far outweigh the restraint on the peripheral right to grow a beard."

The third criterion was met as follows:

> . . . [I]t does not appear that an alternative less subversive of petitioner's right to grow a beard was available. The respondent-Board, confronted with the expert opinion of educators, coupled with actual experience at the high school level as to the adverse effect of the wearing of moustaches by male students, was placed in the situation of adopting a Good Grooming Policy to either permit moustaches and beards with the attendant disruption or institute the cleanshaven rule. There was no middle course or compromise available. Under such circumstances, the Board would have been neglecting its responsibilities by taking a position of inaction.

Moreover, the court expressly rejected the argument that, "because a beard cannot be donned and doffed for work or play as wearing apparel generally can," the ruling unconstitutionally extended into petitioner's homelife and thereby violated his right of privacy. The United States Supreme Court declined to review the decision.[84]

In the other California case, an appellate court upheld by a two-to-one margin a lower court order that compelled a high school to reinstate a student who had been excluded from school under a dress policy which provided that "extremes of hair styles are not acceptable."[85] In this case the student did not assert he had the right to disobey rules directed to his hair. The rule was attacked on the ground of unconstitutional vagueness, because the expression "extremes of hair styles" was not clarified in the rules or in their application.

Even though this court ruled for the student, its reasoning followed that of the preceding case. Applying the same three criteria used in the earlier case, the court found the first two were met. There was substantial evidence that long hair on male students had had a disruptive effect at the high school and that the public had an "obvious interest in an undistracted educational process at the school." However, the court observed that the inhibition of hairstyles does restrain freedom of expression and "in this area, the standards of permissible statutory vagueness are strict and government may regulate 'only with narrow specificity.'"

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[84]Akin v. Board of Education, 262 A.C.A. 187, 68 Cal. Rptr. 557 (1968), cert.denied, 393 U.S. 1041, 89 S.Ct. 668 (1969).

[85]Meyers v. Arcata Union High School District, 269 A.C.A. 633, 75 Cal. Rptr. 68 (1969).

The court, in distinguishing this case from the preceding one, said the no-beard rule in that case met the "narrow specificity" test "because a beard—and its presence or absence—is a fact. 'Extremes of hair styles,' however, are not facts: whether a given style is 'extreme' or not is a matter of opinion, and the definitive opinion here rested in the sole—and neither controlled nor guided—judgment of a single school official." The court pointed out that the importance of an education to a child is substantial, and therefore the state cannot condition the availability of education on the child's compliance with an unconstitutionally vague standard of conduct. However, the court stated that the governing board could exercise its statutory rule-making power to adopt clear rules covering "aspects of student dress and appearance which have an adverse effect upon the educational process at the school."

The two most recent state-level appellate court decisions on the question of public school student hairstyles came from the Supreme Court of Mississippi and the District Court of Appeal of Florida. Each ruled against students who contested board regulations, the former on the merits and the latter on a procedural point.[36]

SECRET SOCIETIES

State Statutes

The first appellate case that involved a state statute regulating secret societies in public schools was decided in California in 1912[37] The enactment provided:

> From and after the passage of this act, it shall be unlawful for any pupil, enrolled as such in any elementary or secondary school of this state, to join or become a member of any secret fraternity, sorority or club, wholly or partly formed from the membership of pupils attending such public schools, or to take part in the organization or formation of any such fraternity, sorority or secret club; provided that nothing in this section shall be construed to prevent anyone subject to the provisions of the section from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America or other kindred organizations not directly associated with the public schools of the state.

Local boards were empowered to enforce the provisions of the act and were required to suspend or, if necessary, expel pupils who refuse to comply.

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[36]Shows v. Freeman, 230 So.2d 63 (Miss. 1969); Canney v. Board of Public Instruction of Alachua County, 231 So.2d 34 (Fla. App. 1970).

[37]Bradford v. Board of Education of City and County of San Francisco, 18 Cal.App. 19, 121 P. 929 (1912).

The statute was first attacked on the ground that it created an improper "immunity to certain pupils in the public schools of the state, viz., those in the normal schools," because only elementary and secondary schools came under the provision of the act. It was further contended that the statute granted a privilege and immunity to the groups named in the statute and thus constituted an unequal application of law.

The court held the classification "elementary and secondary schools" to be valid. Further, the court upheld the exception of certain groups because these organizations were not "directly associated with the public schools of the state"; the distinction between groups directly associated with the public schools and those not was a constitutional one. To the claim that the deprivation of a citizen's right to attend public school if he belonged to a barred society violated the Fourteenth Amendment, the court answered that "rights and privileges granted to citizens which depend solely upon the laws of a state are not within this constitutional inhibition." The court said no person could lawfully demand to be admitted as a pupil to a public school merely because he is a citizen.

Although not directly involving the public schools, a decision by the United States Supreme Court three years later seemed to firmly establish the right of a state to prohibit membership in secret societies by students attending public educational institutions.[38] A rule forbidding membership in fraternities was unsuccessfully challenged by a student seeking admission to the University of Mississippi. The Court found that the control of the university was under the state of Mississippi and that "whether such membership makes against discipline was for the state of Mississippi to determine. . . . It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity."

> It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which that state of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the 14th Amendment.

Despite the *Waugh* decision, persistently through the years numerous cases have dealt with control of sororities and fraternities. All attacks on the validity of statutes have failed, even in-

[38]Waugh v. Board of Trustees of the University of Mississippi, 237 U.S. 589, 35 S.Ct. 720 (1915).

cluding a challenge to a Michigan statute that required suspension, expulsion, or withholding of credit and a diploma from anyone enrolled in a public school who was a member of a secret society.[39] In that case in 1931 a high school senior who belonged to a fraternity was permitted by the board to remain in school but was denied credits essential to receiving a diploma. The student, aware of the penalty, elected to challenge the constitutionality of the statute. He was unsuccessful, the Supreme Court of Michigan following the *Waugh* reasoning as regards the Fourteenth Amendment, and, further, finding that because of his willful violation of the statute the penalty did not constitute a cruel or unusual punishment.

The United States Supreme Court in 1945 affirmed a lower court ruling that the state of Louisiana could enact a statute empowering local boards to suspend or expel members of secret societies.[40] In this case, however, the children involved were beyond the age of compulsory school attendance.

Some of the cases in this area warrant special attention because of judicial statements about particular contentions. The issue of the right of parental control was raised in a Florida case in 1945. However, the highest state court found the issue not relevant in its decision upholding the constitutionality of the statute.[41] It flatly stated, "We cannot see that the question of state versus parental control enters into the picture in any manner. The public school system has a very definite place in our scheme of things and the question in every case is whether or not the high school fraternity or sorority disrupts or materially interferes with that purpose."

The Supreme Court of Oregon in 1952 discussed the issue of constitutional rights of pupils in a case involving a local board's rule established to implement a 1909 state statute.[42] The statute "declared unlawful" secret societies that may "exist among the pupils of any of the public schools" in the state, and made it "the duty of each school board" to "suppress all secret societies" of pupils. Boards were authorized to suspend or expel "all pupils who engage in the organization or maintenance of such societies." After a period of loose enforcement, the local board adopted a series of rules to regulate the kinds of organizations that would be per-

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[39]Steele v. Sexton, 253 Mich. 32, 234 N.W. 436 (1931).

[40]Hughes v. Caddo Parish School Board, 57 F. Supp. 508 (D.C.La. 1944), affirmed, 323 U.S. 685, 65 S.Ct. 562 (1945).

[41]Satan Fraternity v. Board of Public Instruction for Dade County, 156 Fla. 222, 22 So. 2d 892 (1945).

[42]Burkitt v. School District No. 1, Multnomah County, 195 Or. 471, 246 P.2d, 566 (1952).

mitted to operate in the schools. One rule provided that any organization operating in a school must comprise only regularly enrolled students of that school. Thus, interschool clubs and those containing as members graduates or students who had dropped out of school would not be permitted. The validity of this rule was the principal question

The court upheld the school authorities:

> There is nothing in Rule 7, nor in any other of the rules adopted by the school board, which prevents the minor plaintiffs from assembling and associating freely at any time and place, outside of school hours, approved by their parents, with children from other high schools, public or private. This is their constitutional right. But they have no constitutional right to be members of clubs organized in the high schools, and composed of children attending different high schools, and which the school board may have substantial reason for believing to be inimical to the discipline and effective operation of the schools. . . . When they [the students] avail themselves of that opportunity [of public education] they must, in the nature of things, submit to the discipline of the schools and to regulations reasonably calculated to promote such discipline and the high purpose for which the schools are established—the education of youth, which is not limited to the imparting of knowledge, but includes as well the development of character and preparation for the assumption of the responsibilities of citizenship in a democracy. To attain these ends not the least in value of the lessons to be learned are the lessons of self-restraint, self-discipline, tolerance, and respect for duly constituted authority. In this regard parents and the schools have their respective rights and duties, which complement one another, and may be exercised and discharged in cooperation for the welfare of the child and the state.

A similar point of view was taken a decade later by the Court of Appeals of Ohio.[43] At issue was a local board regulation that prohibited public school pupils who were members of secret societies from participating in "athletic, literary, military, musical, dramatic, service, scientific, scholastic, and other similar activities." Further, such students were not eligible for awards, student office, or the honor society. An anti-secret society statute existed in the Ohio penal code, but the court commented that the statute was not necessary to the sustaining of the board's policy.

The meetings of some clubs prohibited by the rule were held in the homes of parents, not on school property. However, the court stated boards of education could act as did this board against any organizations having a deleterious influence on school operation. The court heeded the assertion of school authorities that the clubs had a divisive effect and created administrative problems. The

[43]Holyroyd v. Eibling, 116 Ohio App. 440, 188 N.E.2d 797 (1962).

argument that the rule denied parents the right to select associates for their children off school premises was not persuasive to the court. No "natural" or constitutional rights of parents or pupils were deemed violated.

Some suits have contested the applicability of anti-secret society statutes to particular groups. This issue appeared in the previous case. The clubs in that case had essentially the attributes of secret societies—"rushing," pledges, initiations, pins, secret words, and membership only on approval of club members.

Whether a club was "secret" figured prominently in a 1966 ruling by the Court of Appeal of California.[44] In reversing the trial court, the higher court observed that the bylaws of the organization in question permitted only twenty girls throughout the entire Sacramento school system to be rushed during a semester. Names were proposed by letters of recommendation and each candidate had to be sponsored by three members, the only qualifications being that the girl must have reached ninth grade, have a "C" average, have read two books not prescribed as compulsory reading, and "not have been a member of a club of the nature of . . . [the club in question] within four years." Candidates were then selected by an admission committee of sixteen girls in a process "so secret that the general membership [was] never apprised of . . . [the committee's] membership." The court described the ritual of the club and concluded the activities were sufficient to justify legally characterizing the club as secret.

Local Board Regulations

The Supreme Court of Washington in 1906 decided the first appellate case regarding control by public school authorities of secret societies of pupils in the absence of a pertinent state statute.[45] The board of education in Seattle had adopted a rule prohibiting members of "Greek-letter Fraternities" from participating in extracurricular activities. Arguments similar to those that have been directed against state statutes were also directed against this local rule. These included contentions that fraternity members were "entitled to all the privileges of said high school," that they were "unjustly prohibited from belonging to" extracurricular clubs and teams and deprived of the "customary honors attending graduation," that the rules were "in excess of lawful authority," that

[44]Robinson v. Sacramento City Unified School District, 245 Cal.App. 2d 278, 53 Cal. Rptr. 781 (1966).

[45]Wayland v. Board of School Directors of School District No. 1, 43 Wash. 441, 86 P. 642 (1906).

there was "nothing objectionable in said fraternity," and that, since its meetings were held in the evening at homes of the members with the parents' consent, the students were then "under parental control."

The court learned from the evidence that the fraternity in the school was "a branch or chapter of a general organization having other chapters in various high schools throughout the country [and] that it [was] subordinate to a general or parent governing body." Particular notice was taken of a magazine published by the fraternity that included the following editorial comment: "The principal of the Seattle high school does not know what a fraternity is, or he would not attempt to enforce his proposed futile plans. It is simply a case of all educators not educated. Imagine the monarch that could prohibit a man from wearing a fraternity pin . . . . We hope that others will learn and save us the trouble of summoning our army of able attorneys, who are willing to defend us in the courts, and in doing so will make these uneducated beings feel their lack of knowledge with humiliation and chagrin at the expense of the poor unfortunates." The court further observed that letters published in the magazine from members of the Seattle chapter and other chapters showed a "spirit of insubordination against lawful school authority."

The court then addressed itself to the question whether the board of education had authority to adopt the rule. In answering affirmatively, the court held that the forfeiting of "certain privileges which are no necessary part of the curriculum or class work" may be imposed on continuing members of the fraternity. The court expressed the opinion that "the board has not invaded the homes of any pupils, nor have they sought to interfere with parental custody and control," since the fraternities could continue to meet.

The court relied heavily on the testimony of the principal, who stated he had "found that membership in a fraternity has tended to lower the scholarship of the fraternity members." He also testified that "the general impression that one gets in dealing with them is one of less respect and obedience to teachers. It is found that there is a tendency toward the snobbish and patronizing air, not only toward the pupils, but toward the teachers; there is a certain contempt for school authority . . . . In dealing with these fraternity members, I have been assured more than once that they considered their obligation to their fraternity [and particularly the national aspect of it] greater than that to the school."

One of the appellant's contentions was that the trial court had erred because the evidence did not sustain its finding that all active members of the fraternity were high school students. However, the court commented that "it is immaterial whether [a specified member], or even other members, were students."

Although the view that local boards have implied powers to regulate student membership in secret societies has been accepted to date by all courts, two cases require special attention.

The Court of Civil Appeals of Texas in 1945 considered a point not involved in other cases.[46] It was that a rule barring fraternity members from participation in extracurricular activities may not be applied to such membership during vacation period.

The only case in which school authorities were not upheld in their regulation of secret societies was decided in St. Louis in 1922.[47] The Supreme Court of Missouri, stating that the domain of the school "ceases when the child reaches its home unless its act is such as to affect the conduct and discipline of the school," found in this case that the evidence of the detrimental effect of fraternity membership on the operation of the school was not sufficient to sustain the rule.

MARRIED STUDENTS AND MOTHERS

A question asked with increasing frequency concerns the extent of the authority boards of education have in relation to married students: Where compulsory-education statutes confer a right upon persons of certain ages to attend the public schools, can this right be denied or restricted for the sole reason of marriage?

Permanent Exclusion

The highest courts of Mississippi and Kansas in 1929 enunciated the rule that marriage is not an acceptable basis for permanently excluding from school an otherwise qualified person. No appellate court has disagreed with this fundamental proposition.

In the Mississippi case it was alleged that the rule excluding married pupils constituted an abuse of discretion by the board of education.[48] In defense of the rule the board argued that "the marriage relation brings about views of life which should not be

[46]Wilson v. Abilene Independent School District, 190 S.W.2d 406 (Tex.Civ.App. 1945).
[47]Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43 (1922).
[48]McLeod v. State ex rel. Colmer, 154 Miss. 468, 122 So. 737 (1929).

known to unmarried children [and] that a married child in the public schools will make known to its associates in the schools such views, which will therefore be detrimental to the welfare of the schools." The court, in invalidating the rule, commented, "We fail to appreciate the force of the argument. Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives, the effect upon the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed."

The Kansas case concerned a girl who as a sophomore had left school at the end of the first semester, though she had been promoted to the second semester.[49] When she attempted to return to school the following fall, she was informed she would not be allowed to attend because she was married. The girl had borne a child "not prematurely" less than six months after her marriage, and had since separated from her husband. Evidence was offered that, though the girl was still married, she associated with other men, and had "persuaded another girl sixteen years of age to accompany her to a public dance."

On the other hand, affidavits showed that the girl was of good moral character, that she had attended the dance in the company of her mother, and that one of the males with whom she was seen was her cousin. The court concluded the evidence was insufficient to warrant the board's excluding the girl from school. It noted, however, that "the constitutional and statutory right of every child to attend the public schools is subject always to reasonable regulation, and a child who is of a licentious or immoral character may be refused admission."

> . . . [W]hile great care should be taken to preserve order and proper discipline, it is proper also to see that no one within school age should be denied the privilege of attending school unless it is clear that the public interest demands [it] . . . . It is the policy of the state to encourage the student to equip himself with a good education. The fact that the plaintiff's daughter desired to attend school was of itself an indication of character warranting favorable consideration.

In 1969 a United States district court in Mississippi considered a policy under which unwed mothers of school age were excluded from the public schools.[50] The action was brought on behalf of all unwed mothers of school age. The essence of the complaint

[49]Nutt v. Board of Education of Goodland, 128 Kan. 507, 278 P. 1065 (1929).
[50]Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (D.C.Miss. 1969).

was that the policy violated the equal protection clause of the Fourteenth Amendment. The court agreed, and invalidated the rule.

The court spoke of the importance of education to a person living in modern society. The plaintiffs presented evidence that unwed mothers allowed to continue their education are less likely to have a second illegitimate child. "In effect the opportunity to pursue their education gives them a hope for the future so that they are less likely to fall into the snare of repeat illegitimate births." However, the court stated it was "aware of the [school authorities'] fear that the presence of unwed mothers in the schools will be a bad influence on the other students vis-a-vis their presence indicating society's approval or acquiescence in the illegitimate births or vis-a-vis the association of the unwed mother with the other students." The court then differentiated between the situation of an unwed pregnant girl and that of an unwed mother:

> The Court can understand and appreciate the effect which the presence of an unwed pregnant girl may have on other students in a school. Yet after the girl has the baby and has the opportunity to realize her wrong and rehabilitate herself, it seems patently unreasonable that she should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition. . . .
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> . . . But after the girl has the child, she should have the opportunity for applying for readmission and demonstrating to the school that she is qualified to continue her education. The continued exclusion of a girl without a hearing or some other opportunity to demonstrate her qualification for readmission serves no useful purpose and works an obvious hardship on the individual.

The court emphasized that an inquiry should be had into each case and added that it "would like to make manifestly clear that lack of moral character is certainly a reason for excluding a child from public education."

Exclusion with Alternative Opportunities

Sometimes when a student is excluded from regular public school, he may be provided with alternative facilities for obtaining education. In an Ohio case, for example, a board rule required that a girl withdraw from school because she was pregnant; however, she was allowed to continue school work at home.[51] The board successfully contended its regulation was in the interest of the physical well-being of the girl and not a punitive measure. The

[51]State ex rel. Idle v. Chamberlain, 12 Ohio Misc. 44, 175 N.E.2d 539 (1961).

court found it to be within the board's discretion to determine that the presence of pregnant girls might adversely affect "the discipline and government of the students."

At issue in Texas courts was a rule that forbade admission of a married mother to the public schools.[52] The case was brought on behalf of a sixteen-year-old mother who was prevented from enrolling. She was married but had filed for divorce. The rule stated: "If a married pupil wants to start her family, she must withdraw from public school. Such a pupil will, however, be encouraged to continue her education in the local adult education program and correspondence courses."

The Court of Civil Appeals of Texas observed that the rule would forever prevent a mother from reentering public school. Furthermore, the adult education program in the Texas community would not accept her until she became twenty-one, and available correspondence courses would not provide her with the credits necessary to enter college. The court invalidated the rule, but stated, "this holding does not mean that rules disciplining the children may not be adopted, but any such rule may not result in suspension beyond the current term."

Temporary Exclusion

In another Texas case, relief was sought against the application of a rule that required students who married during the school term to withdraw from school for the remainder of the school year.[53] The appellate court struck down the rule, holding it was arbitrary because it "made marriage, ipso facto, the basis for denial of a student's right to obtain an education." The school board tried unsuccessfully to distinguish the case from the preceding one by stating that the rule annulled in that case had the effect of permanently excluding the party from school, whereas the rule in the present case provided only for temporary exclusion. The Court of Civil Appeals stated succinctly: "If a student is entitled to admission, the question of the length of exclusion is not material."

Later that year a third marriage case reached the Texas Court of Civil Appeals.[54] The question was whether marriage alone constitutes sufficient ground to suspend a student from school for a

[52]Alvin Independent School District v. Cooper, 404 S.W.2d 76 (Tex.Civ.App. 1966).
[53]Anderson v. Canyon Independent School District, 412 S.W.2d 387 (Tex.Civ.App. 1967).
[54]Carrollton-Farmers Branch Independent School District v. Knight, 418 S.W.2d 535 (Tex.Civ.App. 1967).

definite period of three weeks, after which reapplication for admission could be made to the principal. The court enjoined the school board from enforcing this rule, which was not in writing on the date of marriage of the two students who had filed suit. The court ordered the board to allow the students to attend school for what the court emphasized as scholastic purposes only. Noting that the girl was an honor student who hoped to earn a college scholarship and that the boy was having such a difficult time that if he missed classes for three weeks he would probably fail, the court stated:

> The great preponderance of the evidence adduced at the trial established that the presence and attendance . . . [of the students under the trial court's injunction] did not cause turmoil, unrest and upheaval against education by fellow students. The appellees were not approached by other students regarding the subject of married life. The ability of appellees to study was not affected by marriage. The evidence also showed that the resolution suspending students from school for marriage had not been uniformly applied.

The court quoted extensively from the two preceding Texas opinions, and summarized its holding as follows:

> We think the weight of authority in Texas and in the United States is to the effect that marriage alone is not a proper ground for a school district to suspend a student from attending school for scholastic purposes only.

The Supreme Court of Tennessee in 1957 had taken a different stance when it sustained the temporary exclusion from school of pupils who married during the school year.[55] The resolution of the school board provided for the automatic exclusion of pupils who married during a term for the remainder of that term, and of pupils who married during the summer vacation for the fall semester. All school principals in the county had asked the board of education to adopt the rule because they felt student marriages had caused a deterioration of discipline and decorum in the schools.

In sustaining the rule the court stated the principals "should be regarded by reason of training, experience and observation as possessing particular knowledge as to the problem which they say is made by the marriage and uninterrupted attendance of students in their respective schools." The court gave weight to the principals' testimony that most of the disorder occurred "immediately after the marriage and during the period of readjustment," and

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[55]State ex rel. Thompson v. Marion County Board of Education, 202 Tenn. 29, 302 S.W.2d 57 (1957).

that the "influence of married students on the other students is also greatest at this time." The court commented:

> . . . [I]t is not a question of whether this or that individual judge or court considers a given regulation adopted by tne Board as expedient. The Court's duty, regardless of its personal views, is to uphold the Board's regulation unless it is generally viewed as being arbitrary and unreasonable. Any other policy would result in confusion detrimental to the progress and efficiency of our public school system.

Seven years later the validity of a similar regulation was considered by the highest court of Kentucky.[56] The substantive difference in the wording was that the length of withdrawal was to be for a full year, after which time a pupil could reenter school as a special student with permission of the principal. On reentry, however, homerooms, studyhalls, class activities, social events, and athletics were to be barred. The school board supported its policy on the same grounds as had the Tennessee board. The school superintendent had stated that marriages during the school term caused discussion and excitement, thereby disrupting school work. Moreover, some parents had requested that the rule be adopted.

The Court of Appeals of Kentucky struck down the regulation, finding "the fatal vice" to be "its sweeping, advance determination that every married student, regardless of the circumstances, must lose at least a year's schooling." The court further noted that the principal was not provided with any guidelines to follow in granting a married student permission to resume school. In addition, it observed that the way school authorities enforced the regulation "accentuates the fact that the regulation is not realistically related to its purported purpose."

> It is asserted for the Board that the most intense disruptive impact of a student marriage occurs during the time just preceding and just following the marriage. Yet, under the uniformly followed pattern of administration of this regulation, the married student is permitted to remain in school during all of the time preceding the marriage, and may remain for a maximum of six weeks thereafter. Such procedure, even though premised on the Board's commendable desire to permit the student to complete the current term, effectively frustrates the prime purpose of the regulation.

Restrictions on Extracurricular Activities

The attitude of the courts toward marriage as a cause for exclusion from extracurricular activities has been markedly different from their attitude toward marriage as a cause for exclusion from school. Although there have been dissents from some opinions,

[56] Board of Education of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. 1964).

all decisions to date have upheld the board's power to limit married students' participation in extracurricular activities.

The first case to deal specifically with the subject was decided by the Court of Civil Appeals of Texas in 1959.[57] The school board policy provided that "married students or previously married students be restricted wholly to classroom work; that they be barred from participating in athletics or other exhibitions, and that they not be permitted to hold class offices or other positions of honor." Academic honors were excepted.

A sixteen-year-old male married a fifteen-year-old female with the result that he was barred from further participation in athletic activities. In challenging the rule, the student claimed he was hoping for an athletic scholarship to a college and that the rule deprived him of this opportunity. He also argued that the regulation was contrary to public policy in that it penalized persons because of marriage.

The school board's evidence, which satisfied the court, included the following: The parent-teacher association had made an extensive study of teenage marriages and had recommended the board resolution; this study had "included the ill effect of married students participating in extra-curricular activities with unmarried students"; a board member, who was a professional psychologist and former teacher, stated that a survey among parents of high school students "indicated a definite need for the resolution"; in the previous year twenty-four of a total of sixty-two married students had dropped out of school and at least one-half of the remainder had experienced a drop of at least ten points in grades.

As to the boy's "right" to play football with the potential of achieving an athletic scholarship to college, the court said such was a "contingent or expectant" right rather than a "vested" right, despite the fact the boy had played football for the school and was married prior to the adoption of the rule.

Regarding the public policy argument, the court noted that teenage marriages were permitted only upon express consent of the parent or guardian and that below certain ages marriage was prohibited. It further commented that the principle of looking with favor on marriage applied to those of lawful age, whereas "the legislative policy is otherwise insofar as an underage marriage is concerned."

[57]Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex.Civ.App. 1959).

The following year the Supreme Court of Michigan, by an equally divided court, sustained a school board rule that married students "shall not be eligible to participate in any co-curricular activities; i.e., competitive sports, band, glee club, class and class officers, cheerleading, physical education, class plays and etc."[58] Two boys, each of whom was legally married, brought suit.

The superintendent testified the boys were excellent students and had not created discipline problems since their marriages.

After the trial court sustained the board's action, an appeal was brought, with the Attorney General of Michigan on the side of the students. One judge voted to affirm on the ground the case was moot. The three judges who upheld the rule per se cited the *Kissick* case *(supra).* The other four, ignoring this case, wrote they could not find a decision by any state's highest court dealing with the question. (*Kissick* was decided by an intermediate appellate court.) They believed that a partial denial of opportunities to a student for the sole reason of marriage was not a reasonable exercise of authority by a school district.

The reasons the board had offered in support of the rule included: "the possible bad influence when married students are forced to be closely associated with their unmarried peers in any way other than the more formal circumstances; that is, classrooms, under the immediate supervision of a teacher"; and the possible bad effect if married students are "in a position of idolization," as on the football team, because students are inclined to emulate their peers.

The highest courts of Utah and Iowa have also supported the power of school authorities to restrict extracurricular activities of married students. In 1963, the Supreme Court of Utah unanimously stated that because extracurricular activities are supplemental to the regular classes of the academic curriculum and are supplied under the discretionary power of the board, the extent they are made available can be decided by the board.[59] In this case the board had not barred married students from band, speech, drama, and choir. Permitting married students to engage in these, but not other activities, was not considered an unconstitutional discrimination by the court because these activities were closely allied with regular classwork taken for credit. The court also found it proper

[58]Cochrane v. Board of Education of Mesick Consolidated School District, 360 Mich. 390, 103 N.W.2d 569 (1960).

[59]Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963).

for the board to permit students already married when the rule was adopted to continue in all activities.

The court discussed its role as follows:

> It is not for the courts to be concerned with the wisdom or propriety of the resolution as to its social desirability, nor whether it best serves the objectives of education, nor with the convenience or inconvenience of its application to the plaintiff in his particular circumstances. So long as a resolution is deemed by the Board of Education to serve the purpose of best promoting the objectives of the school and the standards of eligibility are based upon uniformly applied classifications which bear some reasonable relationship to the objectives, it cannot be said to be capricious, arbitrary or unjustly discriminatory.

In 1967, the Supreme Court of Iowa, in upholding a rule that barred married students from extracurricular activities, discussed the power of school boards to regulate student conduct on matters outside the domain of the school.[60] The court stated it is not within a school board's power "to govern or control the individual conduct of students *wholly* outside the school room or playgrounds." However, "the conduct of pupils which directly relates to and affects management of the school and its efficiency is a matter within the sphere of regulations by school authorities."

The action was brought by a student who, though aware of the board rule, had married. He had been a regular player on the basketball team and wished to continue during his senior year but was not permitted to do so under the rule.

The board president, the superintendent, and several school officials testified that the number of high-school-age marriages had recently increased significantly, that marriages were ordinarily followed by lower grades, and that school dropouts increased in a proportion greater for married pupils than for those not married. Further testimony revealed that some married students at times discussed with other students some intimate details concerning their marriages and that this was particularly true during extracurricular activities where close supervision was more difficult.

The board presented the following eight policy considerations it said prompted the adoption of the regulation:

1. Married students assume new and serious responsibilities. Participation in extracurricular activities tends to interfere with discharging these responsibilities.

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[60]Board of Directors of Independent School District of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967).

2. A basic education program is even more essential for married students. Therefore, full attention should be given to the school program in order that such students may achieve success.
3. Teenage marriages are on the increase. Marriage prior to the age set by law should be discouraged. Excluding married students from extracurricular activities may tend to discourage early marriages.
4. Married students need to spend time with their families in order that the marriage will have a better chance of being successful.
5. Married students are more likely to drop out of school. Hence, marriage should be discouraged among teenage students.
6. Married students are more likely to have undesirable influences on other students during the informal extracurricular activities.
7. The personal relationships of married students are different from those of non-married students. Non-married students can be unduly influenced as a result of relationships with married students.
8. Married students may create school moral and disciplinary problems, particularly in the informal extracurricular activities where supervision is more difficult.

EXPRESSION OF OPINION

Insignia and Emblems

The basic judicial position regarding political rights of students in public schools was enunciated first by a panel of the United States Court of Appeals for the Fifth Circuit in 1966. In two decisions announced the same day, the court ruled for the board in one and for the students in the other. Each case involved the wearing of "political" buttons by students. These opinions were cited with approval by the United States Supreme Court, which used their rationale in the *Tinker* armband case *(infra).*

In the first case, a number of students appeared at school wearing buttons containing the words "One Man One Vote" around the perimeter with "SNCC" inscribed in the center.[61] The principal announced that students were not permitted to wear such buttons in the school. He justified this as a disciplinary regulation promulgated because the buttons "didn't have any bearing on their education," "would cause commotion," and would disturb the school program. When thirty to forty children continued to display the buttons, the principal gave them the choice of removing them or being sent home. Most elected to go home, and the principal suspended them for one week.

The Court of Appeals invalidated the rule. The appellate bench noted that on former occasions students had worn "Beatle buttons"

[61]Burnside v. Byars, 363 F.2d 744 (5 Cir. 1966).

and buttons containing the initials of students, and these had not been proscribed. The court held that school children have a right to communicate an idea silently and to encourage the members of their community to exercise their civil rights.

> The right to communicate a matter of vital public concern is embraced in the First Amendment right to freedom of speech and therefore is clearly protected against infringement by state officials. . . . Particularly, the Fourteenth Amendment protects the First Amendment rights of school children against unreasonable rules and regulations imposed by school authorities.

The court recognized that the establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly climate, and further recognized that school officials must be granted a wide latitude of discretion. But it noted that in this case no situation requiring discipline had arisen. The principal admitted that the children were expelled not for disrupting classes, but for violating the school regulation. The court stated:

> Wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speechmaking, all of which have no place in an orderly classroom. If the decorum had been so disturbed by the presence of the "freedom buttons," the principal would have been acting within his authority and the regulation forbidding the presence of buttons on school grounds would have been reasonable. But the affidavits and testimony before the District Court reveal no interference with educational activity and do *not* support a conclusion that there was a commotion or that the buttons tended to distract the minds of the students away from their teachers. Nor do we think that the mere presence of "freedom buttons" is calculated to cause a disturbance sufficient to warrant their exclusion from school premises unless there is some student misconduct involved. Therefore, we conclude after carefully examining all the evidence presented that the regulation forbidding the wearing of "freedom buttons" on school grounds is arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression in the circumstances revealed by the record.

In the second case, school authorities were upheld in banning buttons where the record showed an unusual degree of commotion, boisterous conduct, collision with rights of others, and undermining of authority.[62] The buttons were similar to those of the previous case.

The principal in this case had banned the buttons following a disturbance by students noisily talking about the buttons in the

[62]Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5 Cir. 1966).

hall when they were scheduled to be in class. Shortly thereafter, approximately one hundred and fifty pupils came to school wearing buttons. These students distributed the buttons to other students in the corridors of the building and pinned buttons on some even though they did not want them. One of the students tried to put a button on a younger child who began crying.

The principal called all the students to the cafeteria and informed them once again they were forbidden to wear the buttons at school. Several students conducted themselves discourteously during this time and displayed an attitude of hostility.

The next day about two hundred students appeared wearing buttons. They were assembled and told if they returned to school again wearing the buttons they would be suspended. This they did the next day, and suspension resulted. As the suspended students gathered their books to go home, school activities were generally disrupted. The students interfered with other students still in class and urged other students to leave with them.

The court indicated that the issue presented on this appeal was identical to that in the previous case. The difference in the decision, however, was based on the fact that in this case there was evidence of a disturbance the school authorities had a right, if not a duty, to quell.

Not until 1969 did the United States Supreme Court issue its first opinion involving pupil discipline per se in the *Tinker* case.[63] The case concerned a school board's prohibition of the wearing of black armbands by students desiring to protest hostilities in Vietnam and to support a truce. The Court ruled against the board by a vote of seven to two.

Aware that certain students were planning to wear armbands, the principals of the Des Moines, Iowa, schools adopted a policy that any student wearing an armband would be asked to remove it, and if he refused he would be suspended until he returned without the armband. The Supreme Court stated:

> . . . [T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment . . . .

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[63]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

But the Court added this counterbalancing point:

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The Court also discussed what it was *not* deciding:

The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. Compare *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968) [discussed in this paper *supra*]; *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923) [discussed in this paper *supra*]. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive, expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students.

The Supreme Court concluded that the "record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." It observed that "no disturbances or disorders on the school premises in fact occurred." It further noted that the principals did not ban "the wearing of all symbols of political or controversial significance," but only "a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam." Such a prohibition on "one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible."

The Court established the bounds of its holding as follows:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exer-

cise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. . . .

. . . But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech

Shortly after the *Tinker* decision, a United States district court in Ohio upheld a rule against the wearing of emblems and other insignia not related to school activities in a high school that had experienced severe racial tensions.[64] Although not in writing, the rule against emblems had been applied uniformly in the school for at least forty years. Originally the rule was intended to reduce undesirable divisions created within the student body by fraternities and sororities. However, the rule had acquired, in the words of the court, "a particular importance in recent years. Students have attempted to wear buttons and badges expressing inflammatory messages, which, if permitted, and as the evidence indicates, would lead to substantial racial disorders at [the school]."

Buttons some pupils sought to wear included "White is right," "Black Power," and "Happy Easter, Dr. King." When a student wore the latter button, a fight resulted in the cafeteria.

On another occasion, students from another school in the district entered the corridor wearing a distinctive headdress. As they proceeded down the corridor, they struck and attacked other students whom they had expected to join them in wearing the headdress, but who had not done so.

In the case, a student who refused to remove a button was suspended. The button displayed these words:

April 5 Chicago
G.I. Civilian
Anti-War
Demonstration
Student Mobilization Committee

The court distinguished the case from *Tinker (supra)* on several grounds. Here, all buttons were banned. (The court indicated it would not be administratively feasible to check buttons for acceptability or nonacceptability, and if school authorities were to be selective, First Amendment prior-restraint problems would

[64]Guzick v. Drebus, 305 F.Supp. 472 (D.C.Ohio 1969).

arise.) The rule in this case was long-standing and had been consistently applied. Further, the present situation warranted the continuance of the rule. "School discipline at [the school] is possible because it is administered on an impartial basis. School authorities have attempted to maintain both the position and image of complete neutrality. The adoption of a rule permitting some buttons but excluding others would necessarily involve the school administration in the controversies at [the school]."

The court characterized differently the armbands in *Tinker* and the buttons in this case. Whereas the armbands alone were close to "pure speech," the court emphasized that "a button is not merely a statement; it is an identification tag. It identifies the wearer as an adherent or member of one group or class. It identifies him as not being a member of other groups or classes. This identification aspect exists independent of the nature of the message contained in the button."

Publications

Control of student publications by public school authorities has led to several recent court decisions. However, up to April 30, 1970, only one appellate court decision directly concerning this issue had been officially published.[65] This was a two-to-one decision of the United States Court of Appeals for the Seventh Circuit, on September 25, 1969, upholding the exclusion from school of students who had distributed a publication including some material found offensive by the school administration. However, on April 1, 1970, on rehearing en banc, the court set aside this decision and ruled the pupils could not be expelled.[66] The final decision is treated here even though it was not officially published before April 30.

The en banc opinion was grounded as follows:

> At no time, either before the Board of Education or in the district court, was the expulsion of the plaintiffs justified on grounds other than the objectionable content of the publication. The Board has not objected to the place, time, or manner of distribution. The [district] court found and it is not disputed the plaintiffs' conduct did not cause any commotion or disruption of classes.
>
> No charge was made that the publication was libelous, and the district court felt it unnecessary to consider whether the language in "Grass High"

[65]The citation to the "Advance Sheets" of November 17, 1969, is Scoville v. Board of Education of Joliet Township High School District 204, 415 F.2d 860 (7 Cir. 1969). The opinion was withdrawn before the permanent volume was printed.

[66]Scoville v. Board of Education of Joliet Township High School District 204, 425 F.2d 10 (7 Cir. 1970).

labeled as "inappropriate and indecent" by the Board could be suppressed as obscene. The court thought that the interest in maintaining its school system outweighed the private interest of the plaintiffs in writing and publishing "Grass High."

The district court's error was that it had ruled solely on the basis of the comments in the publication, particularly an editorial that criticized a school pamphlet sent to parents and that urged "all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes."

The Court of Appeals stated that "the *Tinker* rule narrows the question before us to whether the writing of 'Grass High' and its sale in school to sixty students and faculty members could 'reasonably have led [the Board] to *forecast* [emphasis added] substantial disruption of or material interference with school activities . . . or intru[sion] into the lives of others [*sic*].'" The court held that "the district court erred in deciding that the complaint 'on its face' disclosed a clear and present danger justifying the defendants' 'forecast' of the harmful consequences referred to in the *Tinker* rule." The appellate court found no reasonable inference to be drawn from the complaint, which had merely alleged that the items were in the publication. The court continued:

> While recognizing the need of effective discipline in operating schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled. Schools are increasingly accepting student criticism as a worthwhile influence in school administration.
>
> Absent an affirmative showing by the defendants, the district court, faced with the motion to dismiss, inferred from the admitted facts in plaintiffs' complaint and the presented exhibits that the Board action was justified. However, the district court had no factual basis for, and made no meaningful application of, the proper rule of balancing the private interests of plaintiffs' free expression against the state's interest in furthering the public school system . . . . No evidence was taken, for example, to show whether the classroom sales were approved by the teachers, as alleged; of the number of students in the school; of the ages of those to whom "Grass High" was sold; of what the impact was on those who bought "Grass High"; or of the range of modern reading material available to or required of the students in the school library. That plaintiffs may have intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies is of no significance *per se* under the *Tinker* test.

The court commented that a statement in the paper "imputing a 'sick mind' to the dean reflects a disrespectful and tasteless atti-

tude toward authority" and that a statement about sex was an "attempt to amuse," but that neither could justify a "forecast of disruption." The decision was by a vote of five to one.

Some recent cases have treated other aspects of student publications in public schools. In New Rochelle, New York, the right of high school students to publish in the school newspaper a paid advertisement opposing the war in Vietnam was judically upheld.[67] The advertisement read: "The United States government is pursuing a policy in Viet Nam which is both repugnant to moral and international law and dangerous to the future of humanity. We can stop it. We must stop it." When the principal of the school directed that the advertisement not be published, the students claimed an abridgement of their freedom of speech.

The school authorities held that the publication "is not a newspaper in the usual sense" but is "a 'beneficial educational device' developed as part of the curriculum and intended to inure primarily to the benefit to those who compile, edit and publish it." They said the policy is that only purely commercial advertising is accepted for the paper, and that even paid advertising in support of student government nominees is prohibited. News items and editorials are restricted to matters pertaining to the high school and its activities. "In sum," said the court, "defendants' main factual argument is that the war is not a school-related activity, and therefore not qualified for news, editorial and advertising treatment."

After examining back issues of the paper, however, the court noted that "the newspaper is being used as a communications media regarding controversial topics and that the teaching of journalism includes dissemination of such ideas." The court observed that the paper had contained an article on draft board procedures, an article on national political candidates, and reports on such items as the availability of draft counseling outside the school, school fund-raising for Biafra, and drugs. The court said the "presence of articles concerning the draft and student opinion of United States participation in the war shows that the war is considered to be a school-related subject. This being the case, there is no logical reason to permit news stories on the subject and preclude student advertising."

Despite the school authorities' argument that the *Tinker* decision was not relevant, the court referred to the Supreme Court's

[67]Zucker v. Panitz, 299 F.Supp. 102 (D.C.N.Y. 1969).

statement in *Tinker* that "personal intercommunication among the students" is protected not only in the classroom. The court concluded:

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.

Distinguishing the preceding case from one at bar, a federal district court in California upheld a ten-day suspension of two students for having violated a rule against use of "profanity or vulgarity" in an off-campus newspaper they published.[68] The plaintiff students contended that the *Tinker* test protected them because the issue of the paper "did not cause disruption or interference with the normal educational program at [the school] and . . . they were merely expressing their views and opinions, which they had every right to do although such expression might be unpopular with some."

The court found that there had been some disruption, and further, that the case presented an issue different from freedom of speech on political matters. It referred to testimony by the principal and the assistant principal that twenty-five to thirty teachers had told them of interruption of their classes and of inattention by students due to their reading of, and talking about, the publication. (A few teachers testified there were disruptions, and some testified to the contrary.)

The court emphasized that the issue here was not what was said, but how it was said. Although neither pornography nor obscenity as defined by law was involved, the court was satisfied that there were vulgarities in the text as well as in some pictures, and that the rule, reasonable under California statutes, was thus broken. The court concluded that "plaintiffs were not disciplined for the criticism of the school administrators and the faculty, or of the Vietnam war, but because of the profane and vulgar *manner* in which they expressed their views and ideas." The court noted that prior issues of the publication had criticized the school authorities, but no action was taken until the "vulgar" issue was distributed.

That obscene literature in public schools is not protected by general considerations of free speech was observed by a United

[68]Baker v. Downey City Board of Education, 307 F.Supp. 517 (D.C.Cal. 1969).

States district court in Michigan.[69] The court stated school authorities have the power to promulgate "rules concerning the extent to which and the conditions under which obscene materials may or may not be properly on the school premises. . . . Without belaboring the First Amendment issue unnecessarily we are constrained to conclude that the type of regulation here cannot be considered violative of this plaintiff's First Amendment rights." However, the court ruled that a student could not be expelled merely for possession of a magazine containing some words that were also found in a magazine in the library and in a book that was on the reading list for students.

(Previously the court had restrained the board from expelling the student without a hearing.)

A United States district court in Houston, Texas, rendered judgment for students who had been expelled because of their involvement with a "newspaper" that had criticized school officials and contained some material officials thought objectionable.[70] The court found the criticism to be "on a mature and intelligent level." The evidence presented as to disturbances created by distribution of the paper was deemed inadequate to support suppression of the paper. The court further noted that the objected-to items in the publication were "no more obscene than [a] sign hanging in the office of the school athletic coaches." It also observed that the boys had carefully distributed the paper and that they were not responsible for movement of copies by "unknown persons." The court give short shrift to the school authorities' argument that there was an organized student movement attempting to "overthrow" the Houston school system and that elimination of the paper and expulsion of the students were necessary to prevent further "infiltration."

In a case with a complex set of facts partly concerning the content of publications produced off school property, the suspension of a high school student in New York was judicially approved.[71] The student had been involved in a number of incidents amounting to what the court called "a pattern of open and flagrant defiance of school discipline aided and abetted by his parents' encouragement." The court, in discussing the applicability of First Amendment rights to high school students, observed:

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[69]Vought v. Van Buren Public Schools, 306 F.Supp. 1388 (D.C.Mich. 1969).
[70]Sullivan v. Houston Independent School District, 307 F.Supp. 1328 (D.C.Tex. 1969).
[71]Schwartz v. Schuker, 298 F.Supp. 238 (D.C.N.Y. 1969).

> A special note should be taken that the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen fact from propaganda.
> . . . While there is a certain aura of sacredness attached to the First Amendment, nevertheless these First Amendment rights must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all of the students in the school system. The line of reason must be drawn somewhere in this area of ever expanding permissibility. Gross disrespect and contempt for the officials of an educational institution may be justification not only for suspension but also for expulsion of a student.

In another New York case, a federal district court held that a student was not entitled to a prelimiary injunction against his transfer to another school for having distributed an article containing numerous vulgarities.[72] The article had been published in a paper on which was forged the official masthead of the school newspaper.

Prior to this incident the student had engaged in several disruptive activities including one in which a fellow student was injured. After conferences with school authorities at that time, he had voluntarily signed an agreement to obey school rules and to avoid activities "not conducive to a proper school atmosphere."

Following the present incident, the student was given a hearing before the district superintendent, the outcome being his transfer to another school.

DETERMINATION OF PUNISHMENTS

The preceding analysis has focused primarily on the substantive question whether school officials have the authority to control specified elements of student conduct. The penalty invoked against the student usually has been mentioned because an important relation exists between the punishment provided for violating the rule and the rule's legality. Most lawsuits in this area test the authority of school officials not only to establish a rule but also to impose a specific penalty on a student who breaks the rule.

If a rule is found not to be legally permissible under any circumstances, the punishment is irrelevant. On the other hand, if a penalty is found not to be legally permissible (for example, excessive corporal punishment), that fact can be the basis for a judicial ruling on behalf of the student regardless of the rule. In such

[72] Segall v. Jacobson, 295 F.Supp. 1121 (D.C.N.Y. 1969).

a case, the court can invalidate the "rule as applied" and not necessarily clarify whether the rule itself could stand if accompanied by a different punishment.

The penalty most frequently challenged in lawsuits in pupil control is exclusion from school, whether it be called a suspension or an expulsion. It should be noted that a suspension of a student until he complies with a rule may have the same effect as an expulsion if he believes the rule to be invalid and refuses to comply. Because exclusion from school even for a relatively short period may cause a student to fail and lose a whole year, the courts closely examine the grounds on which this particular penalty may be based. A "substantial burden of proof" is on school officials for a decision that may so drastically affect a youth's life.

Differentiation in penalty is perhaps most dramatically illustrated by cases that involve rules concerning married students. Suspension or expulsion of students for the act of marrying has virtually no judicial support. On the other hand, restrictions on extracurricular activities of married students have received complete judicial support.

Recently, much attention has been given to the process of determining penalties for the violation of rules. Precisely what constitutes the "due process" to which a public school student is entitled before he may be penalized for violating a rule has not been judicially clarified. However, the more serious the possible punishment, the more carefully school authorities must proceed.

Clearly, before a student may be excluded for a substantial period, he has the right to a hearing—probably an adversary-type hearing in which he has opportunity to confront witnesses and to refute evidence introduced against him. An adversary-type hearing implies the right to legal counsel. However, in an administrative-type hearing where the result would not deprive the student of a substantial right and where the purpose is to take action "in the best interests of the student," legal counsel need not be permitted.[73]

In cases concerning pupil control, if a court finds "due process" was not observed by school authorities in determining whether a regulation was violated, or in imposing a punishment for an alleged violation, the ruling has little or no bearing on the validity of the rule itself.

[73]Madera v. Board of Education of City of New York, 386 F.2d 778 (2 Cir. 1967), cert. denied, 390 U.S. 1028, 88 S.Ct. 1416 (1968).

CONCLUDING COMMENTS

If there is one thing the field of education law does not need any more of, it is simplistic conclusions. Thus, the preceding record is left to speak for itself, for the reader to consider and utilize as he wishes.

Now, however, the author will offer a few observations of his own in the hope they may be of interest to some concerned with the increasingly significant legal issues involved in control of student activities.

In analyzing the cases reported earlier, the question arises why some of them even went to court. In the answer to this question, one is led to suspect as a factor a rigid clinging by some school officials to prerogatives of authority more fitted to a military operation than to an educational endeavor. Even in some cases decided in favor of school boards, one may wonder what were the costs of the cases to the educational processes of the school districts.

Educational literature profusely contends that all matters under the aegis of the school should be considered important parts of the curriculum. If this contention is valid, what, then, is the justification for restricting the extracurricular activities of students who have married in conformity with relevant statutes, even though the board action is legally permissible?[74]

When a school board must be forced by a court to open its doors to a girl who desires more education but who has committed the "offense" of bearing an out-of-wedlock child, what—and whose—values are applied?[75]

What is the goal of school authorities who try summarily to exclude a boy who brings on the premises a magazine in which one article contains "objectionable" words when those same words appear in a book read in English class and in items in the school library?[76]

What can be said in support of school authorities who condone a "vulgar" sign on the wall of the athletic coaches' office and seek to exclude a student who puts similar words in a publication?[77]

How is one to evaluate a statement presented in court by counsel for the school board, in defending the banning of a student-

[74] *Supra*, notes 57-60.
[75] *Supra*, note 50.
[76] *Supra*, note 69.
[77] *Supra*, note 70.

paid advertisement critical of the Vietnam war, that a school newspaper "would be just as valuable an educational tool if it were compiled and then consigned to the files without publication?"[78]

How can a student or a citizen have confidence in school officials who tell a court they must bar all girls' slacks because they cannot be specific about types of slacks, when they have adopted detailed statements describing the kinds of jewelry and ornamentation that may not be worn in the school?[79]

What objectivity can be ascribed to a principal who testifies in court that "whenever I see a long-hair youngster he is usually leading a riot, he has gotten through committing a crime, he is a dope addict or some such thing?"[80]

What lesson is learned when the principals of a school system, after hearing of a plan by some students to wear armbands supporting a truce in Vietnam, decide to bar this symbol though they have permitted the wearing of buttons relating to national political campaigns and other types of insignia, including the Iron Cross?[81]

A substantial proportion of the cases discussed in this paper involve forms of student expression. Educational writers and speakers, almost as a unified voice, say the prime function of the school is to develop effective citizens for our democracy. It is therefore disquieting to examine the kinds and extent of authority that some school officials will spend energy and tax money to attempt to justify in court.

Lest the foregoing incorrectly indicate that the writer sees only the faults of school authorities, it must be emphasized that a great number of actual and threatened "court cases" are encouraged or "manufactured" by individuals or groups whose motivations are as worthy of condemnation as are the previously mentioned actions of certain school personnel. Challenges to authority are not virtuous per se. Frivolous challenges are as unlikely to lead to a better society as is contentment with the status quo.

The last few years, however, have been an era of questioning of authority in general. Not surprisingly, the attitude of resistance to authority is being focused increasingly on the schools. After all, the schools are the arm of government that most directly affects

[78] *Supra*, note 67.
[79] *Supra*, note 22.
[80] *Supra*, note 26.
[81] *Supra*, note 63.

the daily existence of youths. How school personnel react to the challenge to their authority is therefore important not only for the function of the schools but for the development of youths' general attitudes toward their government.

Misunderstandings about the legal rights of students must be corrected. Too frequently, school officials involved in this issue approach it from one of two extremes, neither of which bodes well. One is a lack of awareness of what the courts are saying the rights of students are in certain types of heretofore unadjudicated situations. The other is a reluctance by school authorities to take reasonable stands and to gather evidence and muster appropriate constitutional arguments to support their needs in operating efficient and effective schools. If school boards and professional personnel are able to develop sound educational and legal arguments to support their actions in cases of discipline, they need not fear the courts. If they are unable to do so, they simply should not try to impose their whims, hunches, or tastes on the students.

Most challenges to school authority come from those who hold a minority point of view on a particular matter—those who question the authority of school officials either to speak for the majority in certain matters or to enforce the majority's belief on the minority. Cases that involve freedom of speech or freedom of appearance clearly evolve from an attempt by a minority to speak or dress in a fashion the majority does not approve. Although the "will of the majority" is a properly revered tenet of American political philosophy, the Bill of Rights was designed to remove certain fundamental rights of individuals from the control of the majority at a given time.

The present American preoccupation with "taking the matter to court," rather than to the legislative or executive branch, seems to indicate that an increasing number of cases dealing with control of student activities are to be expected. The receptiveness of the federal courts to suits brought by parents and students under the Civil Rights Act of 1871 is a relatively new factor contributing to an upsurge in published judicial opinions in the area. (Single-judge federal court decisions are generally published, unlike most decisions by state-level trial courts.) Hopefully, better-selected and better-prepared cases in the future will more clearly define the blurred border between the rights of parents and pupils and the powers and duties of school authorities.

It would be naively idealistic to contend that the proclivities of individual judges are not discernible in decisions on cases concerning control of student activities. Indeed, a certain amount of subjectivity among judges is almost inevitable in an area as sensitive as this. Yet the courts actually disagree very little on fundamentals. Differing results come primarily from differing patterns of facts.

Legally, who wins the case is not nearly as crucial as why the decision was made. Educationally, who wins the case is not nearly as crucial as why the discipline situation could not have been resolved short of recourse to the public, adversary forum of the court.